

Exhibit 5

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December 22, 2021

Via Email

Charlie Gerstein
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Re: *Kent v. PoolTogether, Inc., et al.* - Case No. 1:21-cv-06025-FB-CLP (E.D.N.Y.)

Dear Charlie:

Thank you for your letters dated December 17, 2021, and December 21, 2021, and your email correspondence providing further information. We have had a chance to review the information you provided, and we have further investigated the facts and circumstances regarding Mr. Kent's assent to the Terms of Service on PoolTogether, Inc.'s website, including the binding arbitration agreement.

Before turning to the substance of your correspondence and our investigation, we ask that you refrain from the superfluous and unjustified threats of sanctions, charges of Rule 11 violations, and claims of frivolity that you have included in your correspondence. You have made these charges and threats multiple times in your correspondence, and notably you made them based on a very limited understanding of PoolTogether's website, and before you even provided the videos and screenshots of your client and your investigator interacting with the PoolTogether website. I also note that Plaintiff's Complaint (signed by your firm under Rule 11) contains allegations demonstrating a clear misunderstanding regarding the nature of cryptocurrency protocols in general and the PoolTogether protocol in particular – and we have not, as a professional courtesy, lobbed similar threats against Mr. Kent, your firm, or yourself for those misplaced allegations. Simply put, we intend to act professionally in this matter, and we ask that you do the same going forward.

Turning to the substance of your correspondence, we believe the conclusion you have drawn – *i.e.*, that Mr. Kent was not presented with the Terms of Service – is unsupported by the video and screenshot evidence you have provided. In fact, the evidence you have provided, coupled with other evidence regarding the operation of the website and Mr. Kent's cryptocurrency wallet, confirms that Mr. Kent was in fact presented with the popup screen displaying the Terms of Service, including the binding arbitration agreement.

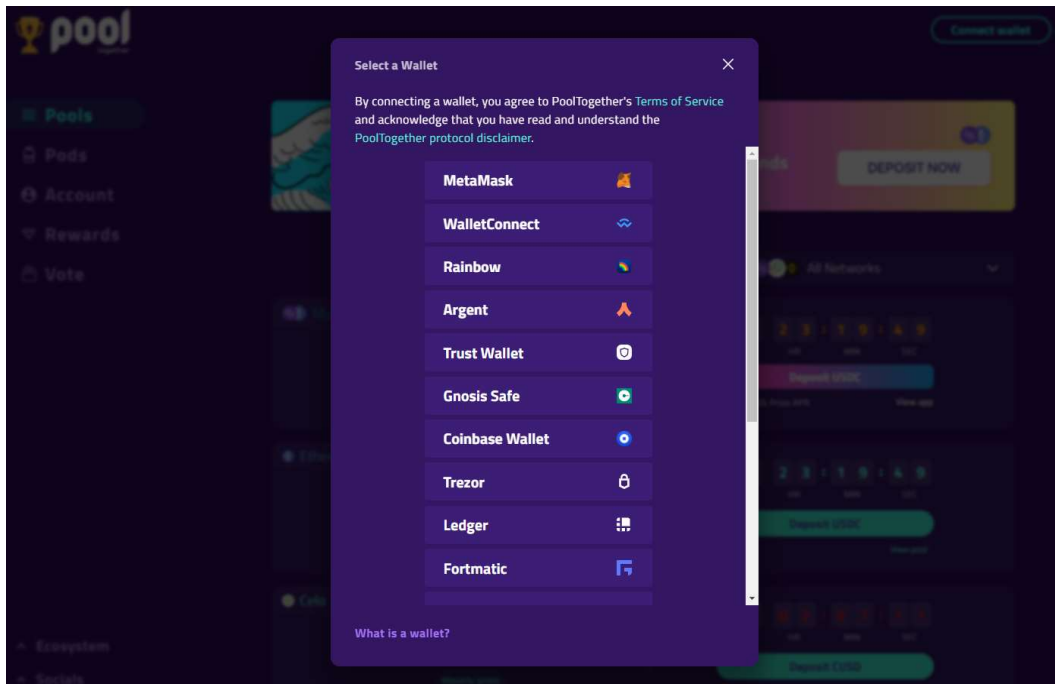
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As explained in prior correspondence, as of 4:42 pm ET on October 20, 2021, when a user initiates the wallet connection process on the app.pooltogether.com website, the user is presented with a popup displaying the Terms of Service along with text providing: “By connecting a wallet, you agree to PoolTogether’s [Terms of Service](#) and acknowledge that you have read and understand the [PoolTogether protocol disclaimer](#).” An example of this screenshot is below.¹



A wallet connection (prompting the above popup) is necessary to engage in certain activities on the website, including to make an “approval transaction” with a particular smart contract (*i.e.*, a “pool”) and to make a subsequent deposit transaction into that pool. To be sure, these three activities – connecting a wallet, engaging in an approval transaction, and making a deposit – are distinct activities. Your December 21, 2021, letter appears to conflate the approval transaction with connecting a wallet. They are not the same. The approval transaction to a particular pool is a prerequisite to making deposits to that pool, and it is something that generally must be done only once for that pool.

¹ The Terms of Service are also available on the pooltogether.com website. We note an inaccurate assertion in your December 21, 2021 letter. Specifically, you assert that Mr. Kent “did not even visit” the pooltogether.com URL, but rather only visited the app.pooltogether.com URL. However, as demonstrated in the October 19, 2021, video of Mr. Kent’s device screen, Mr. Kent did in fact visit the pooltogether.com website, which contains the Terms of Service, before navigating to the app.pooltogether.com.

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In order to engage in the approval transaction (or any subsequent deposit), the user must first connect a wallet (prompting the above popup). Unlike the approval transaction, which only has to be done once for a particular pool, connecting a wallet is something that may have to be done multiple times during a user's interaction with the website.

For example, generally if a user visits the website, connects a wallet, engages in the approval transaction, ends the website session, and returns to the website to make a deposit, the user will have to reconnect the wallet before making the deposit – but the user would not have to make another approval transaction. However, if the user performs all of these activities in one session – wallet connection, approval transaction, and deposit transaction – then the user generally would not need to connect a wallet multiple times because it would remain connected throughout the session based on the initial wallet connection made during that session.

These facts are demonstrated in the videos you sent. For example, in the “October 28, 2021” video, the user first connected a wallet and was presented with the Terms of Service (as you point out, at about 04:16). He then proceeded onto the approval transaction (at about 10:10) and then the deposit transaction itself (at about 11:15). By undertaking all of those transactions in one session, he connected his wallet only once and thus was presented with the Terms of Service (the popup above) only once. Moreover, the example of your investigator (the December 20, 2021 video) demonstrates the other end of the spectrum, in which these activities are performed over multiple sessions spanning many days. Your investigator connected a wallet (seeing the Terms of Service popup) and engaged in an approval transaction on [November 16, 2021](#). On December 20, 2021, your investigator then returned to the website to make a deposit. Importantly, before making the deposit, your investigator was required to reconnect the wallet – thus seeing the Terms of Service popup again – at about 00:17 in the December 20, 2021, video.

Based on the data regarding Mr. Kent's activities on the website, he was presented with the popup displayed above when he was required to reconnect his wallet on October 21, 2021. Unlike the “October 28, 2021” video and more akin to your investigator's experience, it is undisputed Mr. Kent connected his wallet and engaged in the approval transaction on one day (October 19, 2021) and he engaged in a deposit transaction several days later (on October 21, 2021), which necessarily would have required him to reconnect his wallet on the date he made his deposit transaction on October 21, 2021.

We note that the video purporting to show Mr. Kent's deposit transaction on October 21, 2021, is a 47 second clip and begins with Mr. Kent's wallet **already connected**. Please understand that before he began recording his activities on this 47 second clip, Mr. Kent would have been required to reconnect his wallet (even if he previously connected his wallet days before when engaging the prior approval transaction) – and thus he would have been presented with the popup displayed above on October 21, 2021. That Mr. Kent did not record that particular activity does not mean that it did not occur. This can be proven with documentary evidence due to the particular wallet apparently used by Mr. Kent – a Coinbase Wallet – which generates an error log when a wallet fails to connect automatically for a returning user. (We understand he used a

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Coinbase Wallet based on the video of his interaction that you provided.) Specifically, if a Coinbase Wallet user connects a wallet, ends the session on the website, and returns to make a deposit, an error log is typically generated due to the failed connection, requiring the user to reconnect the wallet – thus displaying the popup screen displayed above.

Here, Mr. Kent connected his wallet and engaged in an approval transaction on October 19, 2021. Per your email and the October 19, 2021, video, Mr. Kent apparently could not engage in the deposit transaction that day because he “lacked sufficient gas money” to do so. *See* Dec. 21, 2021, email from C. Gerstein. Thus, Mr. Kent returned to the website approximately two days later, evidently with sufficient gas money in order to make a deposit (notably, this was post-October 20, 2021, *i.e.*, after the Terms of Service popup was implemented and active). But before Mr. Kent could engage in the deposit transaction, he would have been required to reconnect his wallet. In fact, PoolTogether, Inc. has a documented error log (enclosed with this letter) showing that Mr. Kent’s wallet failed to connect automatically on October 21, 2021, at 4:35 pm UTC / 12:35 pm EDT, hours before Mr. Kent ultimately made a successful deposit.²

There is only one way to remedy this error, and that is to reconnect the wallet, which would have required Mr. Kent to view the popup screen displayed above.

Taken together, we trust that this explanation resolves the question of whether Mr. Kent was presented with the popup screen displaying: “By connecting a wallet, you agree to PoolTogether’s Terms of Service and acknowledge that you have read and understand the PoolTogether protocol disclaimer.” Mr. Kent’s connecting his wallet after being presented with the popup was therefore a manifestation of assent to the Terms of Service, including the binding arbitration provisions. We expect your submission to the Court tomorrow will reflect or, at a minimum, not be inconsistent with these facts.

Please feel free to contact us with any further comments or questions on these issues.

Respectfully submitted,

/s/ Behnam Dayanim
Behnam Dayanim
of PAUL HASTINGS LLP

² The IP address associated with this activity was in the New York City area, involving a user with a Coinbase Wallet on an Apple device. (The video of Mr. Kent showed him using an Apple device.) It also took place on a GUSD deposit page, which is not heavily trafficked. Based on the timing, location, device, wallet, and relatively limited activity on the GUSD deposit page during that time, we believe this is Mr. Kent’s IP address.

...L-APP-PRO

▷

Show

Dismiss



codesworth committed 3 days ago

de1e7e

EXAMPLE

71.125.17.238



Chrome
Version: 95.0.4638



Mac OS X
Version: 10.15.7

release	pool-app-production:17af2df27950ed6e742f48125ebe26d250d9a91f ⓘ
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EXCEPTION (most recent call first)

App Only

Full

Raw

Original

Minified

TypeError

Failed to fetch

mechanism

onunhandledrejection

handled

false

JS

Crashed in non-app: ./node_modules/@sentry/utils/esm/instrument.js

chrome-extension://hnfanknocfeofbddgcijnmhfnkdnaad/requestProvider.js in w._handleAsynchronousMethods at line 2:106571

chrome-extension://hnfanknocfeofbddgcijnmhfnkdnaad/requestProvider.js at line 2:104623

<anonymous> in new Promise

chrome-extension://hnfanknocfeofbddgcijnmhfnkdnaad/requestProvider.js in w._sendRequestAsync at line 2:104178

chrome-extension://hnfanknocfeofbddgcijnmhfnkdnaad/requestProvider.js in w.request at line 2:102822

Called from: ./node_modules/@pooltogether/bnc-onboard/dist/esm/onboard-989aa313.js in call

BREADCRUMBS

Filter By

Search breadcrumbs

TYPE	CATEGORY	DESCRIPTION	LEVEL	TIME
	fetch	POST https://mainnet-infura.wallet.coinbase.com [200]	Info	16:34:55
	fetch	POST https://mainnet-infura.wallet.coinbase.com [200]	Info	16:34:56
	fetch	POST https://mainnet-infura.wallet.coinbase.com [200]	Info	16:34:57

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	fetch	POST https://mainnet-infura.wallet.coinbase.com	Error	16:35:07
	exception	TypeError: Failed to fetch		Error 16:35:07

GET /pools/mainnet/gUSD-0x65C882/deposit  app.pooltogether.com

Query String

prevTicketBalance	
prevUnderlyingBalance	
quantity	19

Headers

Referer	https://pooltogether.com/
User-Agent	Mozilla/5.0 (Macintosh; Intel Mac OS X 10_15_7) AppleWebKit/537.36 (KHTML, like Gecko) Chrome/95.0.4638.54 Safari/537.36

USER

IP Address	71.125.17.238	
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BROWSER

Name	Chrome
Version	95.0.4638